Supreme Court, U.S.
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In The

Supreme Court of the United States

Dale Michele Stingley

Petitioner

V.

Den Mar Inc.
Rail Unlimited Inc.

Respondent

PETITION FOR REHEARING

Pro Se Petitioner
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I. INTRODUCTION

Only exceptional circumstances justify this Courts granting of a Petition for Rehearing. Petitioner hereby submits, that this Petition for Rehearing is based on circumstances that are indeed exceptional and of monumental judicial importance.

During a ceremony marking the 200th anniversary of the U.S. Constitution, U. S. Supreme Court Justice Thurgood Marshall spoke the following words. "Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue." Justice Marshall gave credit for progress "To those who refused to acquiesce in outdated notions of "liberty," "justice," and "equality," and who strived to better them." [1]

During pivotal times in our nations history, when the path to true justice has seemed the most obscure, the citizenry has always rested in the expectation that those entrusted with the powers of national leadership would at all times remain true to the constitutional principals of justice and equality for all the people.

There is a growing undercurrent of concern that the fundamental constitutional rights of litigants are being abridged by Congress and U. S. Circuit Courts.

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[1] Justice Thurgood Marshall, The Annual Seminar of the San Francisco Patent And Trademark Law Association in Maui, Hawaii May 6, 1987

These concerns emerged as the result of a two track system of justice, initiated by the Judicial Conference in 1964, in an effort to reduce the number of published opinions with unpublished opinions, in violation of Article III, and the Fifth and Fourteenth Amendments of the Constitution of the United States.

In this instant case, Petitioners appeal to the U. S. Fifth Circuit Court of Appeals has been subjected to the separate and unequal process of local governing rules 5TH CIR. R. 47.5.1, 47.5.2, in violation of her constitutional guarantee of due process of law, found in the Fifth and Fourteenth Amendments of the U. S. Constitution which in relevant part, "prohibit all levels of government (state and federal) from unfairly depriving individuals of their basic constitutional rights to life, liberty, and property without due process of law", and her Fourteen Amendment right to "equal protection of the laws".

The Panel's use of non presidential disposition of Petitioner's case is a violation of Article III of the Constitution, in ways that will herein be described.

II.

ARGUMENT

Not since the era of *Plessy v Ferguson* 163 U.S. 537 (1896), has a rule of law, flawed in the principals

of the separate but equal doctrine, been sanctioned by our government and courts. The "separate but equal" doctrine sanctioned by the U.S.Supreme Court in Plessy, served to justify segregation in many states for the next half century.

The use and misuse of 5TH CIR. R. 47.5.1, 47.5.2, which sanction the doctrine of separate but equal in the federal court system, represents actual judicial abuse demonstrated in this instant case, and massive potential for abuses that violate the constitutional rights of litigants that are similarly situated.

Plessy represented a futile attempt to provide separate but equal transportation and public accommodations for people of color, with the proposition that separate could be equal. That doctrine was later found to be unconstitutional and 5TH CIR. R. 47.5.1, 47.5.2, are both flawed and unconstitutional for some of the same reasons.

U. S. Supreme Court Justice John Harlan in his dissent to Plessy v Ferguson wrote in relevant part, "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches". *Plessy v Ferguson* 163 U.S. 562 (1896)

Justice Harlan's dissent, which was later vindicated by the landmark *Brown v. Board of Education of Topèka,* 347 U. S. 483 (1954) case, directly challenged the separate but equal doctrine for being a mirage of justice, noting that it was "disguised" as a just proposition, but actually had the effect of separating citizens by class and race. Indeed, he deemed it a doctrine that was hostile to the spirit and the letter of the constitution.

In the Brown opinion, Chief Justice Warren made plain that a doctrine of separate but equal was unconstitutional and "had no place in our nations educational system because it denied black children equal protection of the laws guaranteed by the Fourteenth Amendment" *Brown v Board of Education* ,[347 U.S. 483, 484]. The same constitutional principals articulated by Chief Justice Warren in Brown when denouncing the separate but equal doctrine in education, apply to the administration of justice in our federal judicial system. Since the government provides citizens the opportunity to redress grievances, such an opportunity is a right which must be made available to all on equal terms. Anything less deprives of equal protection of the law guaranteed by the constitution.

In 2007, faced with a groundswell of complaints from judges, attorneys, and the public regarding decisional inconsistencies, and the constitutionality of unpublished decisions, Fed. R. App. P. 32.1 was enacted to prohibit disallowing citation of unpublished opinions in all federal courts.

Interestingly, minutes from a 2003 mid-year meeting of the Judicial Conference Committee on Rules, held in Philadelphia Pennsylvania, reflect that Judge Samuel Alito, then Chair of the Advisory Committee on Appellate Rules, addressed the proposed new Fed. R. App. P. 32.1 by stating the proposed rules was, "intended to improve the perception of fairness and openness in appellate decision-making". [2]

These words by Judge Alito, "intended to improve the perception of fairness" are very telling and serve as an indictment on Fed. R. App. P. 32.1, bringing to mind Judge Harlan's dissenting remarks in Plessy, where he denounced "The thin disguise" of equality in the separate but equal doctrine, *Plessy v Ferguson*, 163 U.S. 537, 562]. Justice must be more than a mirage or "perception", it must of necessity be a reality in truth, not mere pretense.

Now, more than a hundred years after Plessy, litigants are subjected to and processed by an appellate rule that by Judge Alito's own admission is designed to improve the publics "perception" of the fairness of the appellate process. Judge Alito also emphasized "the narrowness" of Fed. R. App. 32.1 at that same meeting, explaining that " it does not address the propriety or constitutionality" of issuing opinions that lack precedential value.

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2 Judge Samuel Alito, Judicial Conference Committee on Rules, Philadelphia Pennsylvania 2004

A. QUESTIONS ABOUT THE CONSTITUTIONALITY OF UNPUBLISHED OPINIONS ABOUND

These observations by Judge Alito raise serious questions about enacting a rule that currently affects 80% of federal litigants who appeal cases, while questions of the constitutionality and propriety of unpublished opinions go unanswered. The truth is, the constitutionality of unpublished opinions or non precedential opinions has been questioned for years. Inherent in this flawed policy are critical problems and threats to judicial integrity. Fundamental problems result from the level of discretionary power given appellate courts with the absence of sufficient judicial review, and the lack of public scrutiny.

Justice Thurgood Marshall warned against unpublished opinions and the secret body of law they would create calling both "plainly wrong" *County of Los Angeles v. Kling,. 474 U.S. 936, 938 (1985) (Marshall, J., dissenting)*

"Unpublished opinions not selected for publication are less well reasoned and not as complete as those intended for publication. It is well known that judges may put considerably less effort into opinions that they do not intend to publish." *Wilson v. Layne, 141 F.3d 124 (4th Cir. 1998)*(Murnaghan, J., dissenting) It is general knowledge within the circuits that unpublished opinions are segregated into, and processed by a second class judicial standard.

Given the idiosyncrasies and nuances each case presents, it is un reasonable that 80% of cases merely warrant a cookie cutter form of justice and it is more likely cases are subjected to an unacceptable level of arbitrary judicial preconceptions .

In Anastasoff v United States 233 F.3d 898 (8th Circuit 2000) Judge Arnold struck down Fed. R. App. P. 28A(i) as unconstitutional where it expands judicial power beyond the bounds of Article III. *Anastasoff,* 223 F.3d at 900. Through a review of history surrounding Article III and the doctrine of precedent, Judge Arnold found that the framers intended that every case should become binding precedent, (See *Id. at 903-905*). Petitioner concurs.

Arguments for and against Judge Arnold's interpretation of the intent of Article III abound and beg the attention and direction of this high court. An additional argument that will herein be made, is based on what Article III clearly states. " The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Article III, U. S. Constitution.*

The Article III power vested in Congress to "from time to time establish courts", shows the framers undoubtedly understood that changing times would mean changes in the demands on the federal judiciary, and the need for congress and the courts to adjust to changing demands. At present, 80% of all appellate cases are disposed of by unpublished opinions, and are handled in a manner that is separate and unequal from that of published opinions.

As our nations population continues to increase, so will demands on the federal judiciary. We are on an unsustainable path of increasing appellate unpublished opinion,s while leaving the judicial privilege of published opinions to a select few.

In the face of certain growth in population as the union grew and developed, the Framers surely did not intended that courts merely resort to a flawed separate but equal process that disposes of cases primarily by elimination, rather than accommodation that is fair and equitable. Congress is not fettered or restricted to policies of the status quo, but in the interest of efficiency, resorted to an unjust process that subjects 80% of federal litigants to a separate and unequal judicial process reminiscent of a doctrine this nation has long since put away

B. UNPUBLISHED OPINIONS AT THE EXPENSE OF JUSTICE AND EQUALITY

"There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Plessy v Ferguson* 163 U.S 537, 557 (J. Harlan dissenting)

The process of reducing appellate decisions to published or unpublished, or subjecting litigants to class A or class B, places certain litigants in a more privileged class, while subjecting others to a less privileged class, and predisposes the latter to a reduced likelihood of review.

While the U. S. Supreme Court technically does not deny Certiorari because an opinion is unpublished, statistics clearly show a disproportionate majority of Petitions for Certiorari are granted in cases with published opinions.

In *Brown v Board of Education*, 347 U.S. 483, 492, (1954), inequality was found in that "specific benefits enjoyed by white students were denied to children of color of the same educational qualifications". In this instant case, specific benefits enjoyed by litigants of published opinions were not enjoyed by Petitioner, more specifically, the same level of judicial care and review given published opinions. The denial of judicial equality has deprived Petitioner of equal protection of the laws guaranteed by the Constitution.

Within this separate but unequal judicial system, constitutional checks and balances are virtually nonexistent. Article III of the Constitution in plain unequivocal terms vested the ultimate reviewing powers of the Federal court system in the U. S. Supreme Court. No credible argument can be made that sufficient reviews are conducted to ensure the integrity of this process that designates 80% of appellate cases as non-precedential or unpublished. Petitioner has been subjected to judicial abuses in the Fifth Circuit violating her right to due process with no chance of vindication or judicial accountability unless a Petition for Rehearing is granted.

C. THE PSYCHOLOGY OF INJUSTICE

"Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. U. S. Const., Art. I, §7". Medellín v. Texas, 552 U.S. 491 (2008). (Opinion) Chief Justice John Roberts

Many issues may be argued related to the policy and practice of unpublished opinions. What is clear, is the fact that the framers intended that there be checks and balances subject to the U. S. Constitution in federal law and policy. What is equally clear is those checks and balances designed to prevent governmental abuses do not exist in the policy and practice of unpublished opinions. "Unpublished dispositions do not get any meaningful en banc review-and couldn't possibly. To cite them as if they represented more than the bare result as explicated by some law clerk or staff attorney-is a particularly subtle and insidious form of fraud. [3]

These remarks, by sitting Ninth Circuit Federal Judge Alex Kozinski, represent what many fear is the psychology and mentality of many of those in control of this segregating judicial practice . A judicial environment exist where due diligence is not encouraged in all cases though justice demands it. This process represents a second class system of justice for those subjected to it.

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[3] U S Circuit Judge Alex Kozinski, Letter to Judge Samuel Alito, Re Proposed Federal Rule of Appellate Procedure 32 1 Jan 16,2004

The psychology related to this unjust system and process is a two way street. When the public perceives that an appeal in the U. S. Court of Appeals is an exercise in futility, the people develop a no confidence mentality in that system. Justice O'Connor wrote, "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of S.E. Pa. V Casey* 505 U.S. 833, 844 (1992)

"Opinions dealing with the easy application of established law to specific facts have little use as precedent for other litigants or posterity. A brief written opinion is all that is necessary to inform the litigants of the outcome and the reasons for it."

"Responsible appellate judges must devote more time to an opinion that changes the law or clarifies it in an important way (and may thus affect many litigants in future cases) than to an opinion that simply applies well-established law to specific facts (and thus affects solely the litigants at hand)".

These were remarks made by Judge Samuel Alito in June of 2002. Judge Alito's remarks make clear that the two classes of cases are, and based on his stated position, should be treated differently. Judge Alito, like many proponents of the unpublished opinions process, justify that position primarily based on

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Judge Samuel Alito, Unpublished Judicial Opinions Hearing of The Committee on The Judiciary House of Representatives, Second Session June 27, 2002

judges, their time, and the need to run courts efficiently. A consideration found missing in this argument however, is the rights of "The People". The Constitution is a document designed to first and foremost protect the rights of the people and to prevent the government from abridging those rights.

Judges and their time constraints are considerations the Framers clearly addressed in Article III of the Constitution by vesting Congress with the power to "from time to time create courts". Given this option, any attempt to justify unpublished opinions in the interest of efficiency of the courts, and above the rights of litigants, does not represent a compelling governmental interest, and is therefore unconstitutional. The price for judicial demands on the courts is not to be exacted on the backs of those seeking justice. Petitioner and 80% of federal litigants are subjected to a substandard process where judicial abuses are and can be swept away with no accountability, in the name of efficiency in the courts.

It is noteworthy that proponents of unpublished opinions do not address the lack of judicial checks and balances needed to ensure protection of the rights of litigants, or the many constitutional questions surrounding this process, or the fact that many unpublished opinions are not even written by judges but are delegated to law clerks and lawyers who are not judges. This system of justice structurally subordinates some litigants and privileges others in clear violation of due process, and the 5th and 14th Amendments of the U. S. Constitution.

CONCLUSION

"Justice is most evenly administered when similarly situated parties are treated the same" *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

The need for this High Court to address the constitutionality and propriety of unpublished opinions has reached critical mass. Our system of justice requires more of appellate judges than discriminatory treatment of appellate cases. Acquiescence allows perpetuation of an unjust system.

This is about the rights of everyday citizens who are routinely denied judicial rights. This Petition is submitted by the daughter of a man who died a 100% service connected disabled U. S. Army veteran, and the sister of a U. S. Army Sergeant who served two tours in Iraq to secure freedom for others. The irony is, Petitioner has been denied the justice they willingly served to defend. Petitioner has been subjected to judicial abuses that rise to the level of fraud on the court because the level of malfeasance evidences a culture of systematic abuse, facilitated by a separate and unequal federal judicial system including judges advocating for the defendants, ignoring or misstating facts that were alleged, and misrepresenting precedents, in this extreme case of sexual harassment. A review of the monumental issue of unpublished opinions will serve to confirm suspicions of injustice, or it will dispel all doubts.

For all of the foregoing reasons, Petitioner respectfully submits this Petition for Rehearing.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

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